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Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE
SECRETARY

In the Matter of

Implementation of the
Cable Television Consumer
Protection and Competition
Act of 1992

Cable Home Wiring

MM Docket No. 92-260

REPLY COMMENTS OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION

The California Cable Television Association ("CCTA") is a trade association representing cable television system operators that provide cable television service to over 5.5 million California residents. CCTA's members operate over 400 cable systems in California. These systems distribute cable television services to single family residences, multiple dwelling units ("MDUs"), and multiple building settings through a variety of different system architectures, including fiber-coaxial cable hybrid architecture.

The Cable Television Consumer Protection and Competition Act of 1992¹ requires that the Federal Communications Commission ("FCC" or "Commission") adopt rules regarding the disposition of any cable installed by a cable operator within a subscriber's

¹ Pub. L. No. 102-385, 102 Stat. ____ (1992) ("Cable Act of 1992").

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premises after the subscriber terminates service.² CCTA's members deploy inside wiring which is the subject of the NPRM. In the NPRM, the Commission sought comment on how state property and taxation laws have implications for its rules regarding the disposition of home wiring upon termination of service.³

Some of the parties' comments addressed existing state laws concerning ownership and taxation of inside wiring.⁴ CCTA files these Reply Comments to inform the Commission of developments in California so that its rules will give deference to California law, the ownership relationships which have developed under that legal framework, and the resulting public policy benefits.

CCTA calls for the Commission to adopt flexible rules. These rules should not unnecessarily cause disruption of subscriber or cable operator rights. The Commission need not preempt either state statutes, case law or contractual relationships between cable operators and subscribers in order to fulfill the congressional intent motivating this legislation. In many cases, these relationships have kept costs lower by decreasing cable operator ad valorem property tax burdens. These costs would otherwise be borne by the cable subscriber.

² Id., Section 16(d), to be codified at 47 U.S.C. Section 544.

³ Id. at ¶5 at 3.

⁴ See, Comments of Tele-Communications, Inc. pp. 6-7, Comments of Allen's TV Cable et al. pp. 2-3.

The Commission should encourage extension of service to unwired residences, MDUs and multiple building settings by permitting cable operators to contract with subscribers as to the disposition of inside wiring upon termination of service. As one of the intentions of this legislation is to promote competition between cable operators and other multichannel video providers, the Commission's inside wiring rules should not prevent cable operators from entering new service areas -- particularly new developments. The FCC rules should thus allow them to contract freely with developers and MDU owners and associations as to their respective rights to inside wiring upon termination of service.

As pointed out by the Comments of Times-Mirror Cable Television, Inc.,⁵ a tension exists between the desire on the part of cable television operators to wire new units in an MDU or private development and their legitimate fears that the inside wire that they deploy will be used by a competitor in a manner that provides unfair disadvantage to the cable television operator. CCTA argues that the FCC should forebear from regulating where market forces and relative equality of bargaining position have already created a competitive environment that is one of the goals of the Cable Act of 1992.

CCTA believes that the Commission's rules must take into account the variety of ways that operators and subscribers currently contract for the disposition of inside wiring upon

⁵ Comments of Times-Mirror Cable Television, Inc. pp. 3-4.

termination of service. With respect to single family residences, some California operators choose to retain ownership of the inside wiring upon termination of service in order to protect themselves from multichannel competitors who would appropriate the inside wiring without reasonable compensation to the cable operator and to fulfill the cable operator's legal obligation to prevent signal leakage. Other cable operators simply give the inside wiring to the subscriber upon installation because the cable operator does not want to incur property tax exposure for an item that has become the cable subscriber's fixture.

In Tele-vue Systems, Inc. v. County of Contra Costa the California First District Court of Appeal held that inside wiring had become a fixture of a subscriber's real property.⁶ In that case, the cable operator "neither owned, nor claimed, nor possessed, nor controlled" the inside wiring.⁷ Thus, the interior housedrops could not be assessed for ad valorem property taxation.⁸

The California Civil Code's definition of a "fixture" focuses on the concept of physical annexation.⁹ However, how a

⁶ (1972) 25 C.A. 3d 340, 343 ("Tele-vue") and citing California Code Section 660.

⁷ Id. at 344.

⁸ Id. at 345.

⁹ "A thing is deemed to be affixed to land when it is attached to it by its roots, as in the case of trees, vines, or shrubs; or embedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of

piece of personal property is annexed to real estate is neither the sole nor the most important test. As in Tele-vue, the California courts consider three factors to determine if personal property is a fixture: (1) physical annexation; (2) adaptation to use with real property; and (3) intention to annex to realty. Of these, the intention of the owner of the personal property is the most significant factor to determine if it is intended to become a fixture. The manner of annexation and the use to which the property is put are relevant in determining such intention.¹⁰ Thus, the analysis of the Court of Appeal in Tele-vue properly focused on the fact that the cable operator did not claim any ownership right in the wire and it, therefore, became a fixture.¹¹

On the other hand, the Civil Code goes on to recognize that a person who affixes personal property to the land of another may remove that property if there is an agreement between the personal and real property owners for constructive severance.¹²

cement, plaster, nails, bolts, or screws[.]" California Civil Code, Section 660.

¹⁰ See Witkin, 4 Summary of California Law, 9th Ed., 71-72, "Personal Property" Section 70.

¹¹ California County Assessment Appeals Boards have also upheld disposition of cable housedrops in a manner similar to the result in Tele-vue in determining valuations of cable television systems. See, In the Matter of Concord TV Cable, Findings of Fact, Contra Costa County Assessment Appeals Board (May 20, 1981) and In the Matter of Sacramento Cable Television, Findings of Fact and Conclusions of Law, County of Sacramento Assessment Appeals Board No. 2, p. 2 (July 22, 1988).

¹² "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter,

Parties may agree that articles affixed to realty shall nevertheless remain personal property and such an agreement is binding.¹³

It would, therefore, appear that California cable operators and their subscribers can freely contract as to the disposition of inside wiring upon termination of service. Contracts such as those litigated in Tele-vue, making the inside wiring the property of the homeowner, decrease the cable operator's expenditures for taxation and thus assist operators in meeting other policy goals of the Cable Act of 1992 such as maintaining lower rates. While finding very little common ground with the Wireless Cable Association, we agree with their observations that the Commission is not "writing on a blank slate" ¹⁴ and that the Commission "should take care to avoid unnecessary intrusion into pre-existing arrangements crafted with state laws in mind." ¹⁵

belongs to the owner of the land, unless he chooses to require the former to remove it or the former elects to exercise the right of removal provided for in Section 1013.5 of this chapter." Civil Code Section 1013.

¹³ Witkin 4 Summary of California Law, 9th Ed., 75 "Personal Property" Section 73, citing Cone v. Western Trust and Savings Bank (1937) 21 CA 2nd, 176, 180. [Lease gave lessee right to remove "buildings and structures ... machinery and equipment" at termination thereof]; Oroville-Wyandotte Irrigation District v. Ford (1941) 47 CA 2nd., 531, 539 [Agreement that mining machinery should be removable, held good against taxing authorities despite Public Resource Code section providing that such machinery is "deemed affixed to the mine".]

¹⁴ Comments of Wireless Cable Association, p. 5.

¹⁵ Id. at p. 6.

A distinction should be drawn between the different ownership structures of MDUs. Some are apartment buildings with a single owner. Others are condominiums controlled by an association. In either case, the MDU owner stands on equal footing with the operator in negotiations concerning the disposition of inside wiring upon termination of service. In both settings with relative equality of bargaining position, the FCC should forebear from establishing fixed regulations with respect to the disposition of inside wiring upon termination.

The only arguable area for FCC intervention in either setting is the disposition of inside wiring within the wall of an individual's condominium unit. That condominium owner has a potential ownership interest in the inside wire as a fixture. A tenant has no such interest. In MDUs and multiple building settings the economies of scale increase cable operators' concerns of appropriation of inside wiring by another multichannel video distributor. Given the California courts' protection of the freedom to contract for constructive severance, contracts between operators and apartment owners, condominium associations and developers to leave ownership with the cable operator are likely to be upheld in state courts. This provides cable operators with an incentive for wiring such buildings because it protects the cable company's investment from appropriation by an overbuilder or a developer who might invite a cable company to install wiring and then arbitrarily shift to a satellite master antenna television ("SMATV") operator.

MDUs and multiple building owners, such as educational institutions and industrial park owners, are in much better bargaining positions relative to the cable operator with respect to contracting for installation of inside wiring and the disposition of that inside wiring upon termination of service, given the availability of competing video providers such as SMATVs. MDU and multiple building settings have attempted to exclude cable operators. Thus, those owners are not in need of further protection by the FCC.

In fact, this situation argues that inside wiring rules for cable television operators should apply to all multichannel video providers. Given the important legislative goal of encouraging multi-channel video competition embodied in the 1992 Cable Act, the FCC should exercise enormous care to fashion rules that do not result in a "one-wire" result. This is particularly true if the Commission's goal is to encourage competition and minimize disruption to the customer.

This issue is particularly relevant to questions relating to who pays for replacement of obsolete inside wiring and who is responsible for signal leakage. Cable wiring is not similar to phone wiring in the least. Telephone wire installed fifty years ago is still adequate for today's voice telephone services. Cable television wire does not have nearly this lifetime and is quickly rendered inadequate by succeeding technological innovations. Ten year old coaxial cable is already one generation behind current technological standards. CCTA agrees with the New York State Commission on Cable Television ("NYSCCT")

that "one possible detrimental effect of the transfer of cable wiring ownership from the cable operator is that it may serve to impede the development of increased bandwidth systems."¹⁶ The suggestion by one commentator that the original installer of video wiring should retain responsibility for signal leakage¹⁷ could lead to a situation where a building developer who was required to install cable wiring and has since sold any interest in a building would remain responsible. CCTA agrees with NYSCCT that "the issue of ownership of the internal wiring is secondary to the issue of safe, adequate, and reliable cable service."¹⁸

The California Civil Code is designed in such a way so as to permit a variety of different relationships between cable operators and subscribers. In many cases, state statutes and case law concerning inside wiring have had the effect of keeping rates lower by shifting the property tax burden for the inside wiring from the cable operator to the subscriber. Simple rules with deference to state real and personal property laws permit this kind of flexibility within the Congressional intent behind this section of the Act. The FCC should allow a subscriber to own inside wiring upon termination of service where the cable operator and the subscriber intended that result at the time of the wire's installation. Operators must be permitted to monitor the inside wire for signal leakage and for theft of service. On

¹⁶ NYSCCT Comments, p. 10.

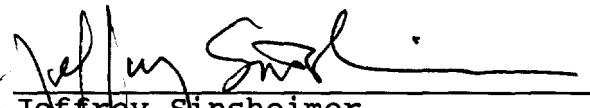
¹⁷ Comments of BellSouth, p. 10.

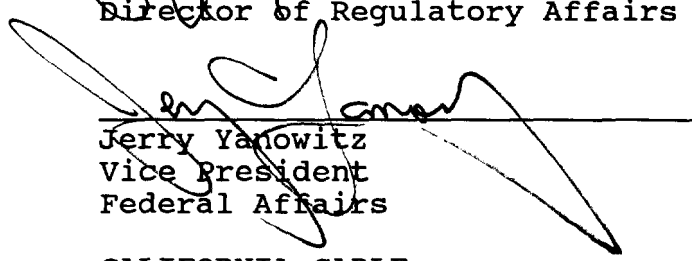
¹⁸ NYSCCT Comments, p. 3.

the other hand, cable operators should be free to enter into contracts, particularly in MDUs and in multiple building settings, to the effect that the inside wire remains the property of the cable operator, and that upon termination of service the operator has the right to remove such wiring.

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Respectfully submitted,



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